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No. 86-2035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

GEORGE O. ALDRIDGE and
DAISY M. ALDRIDGE,
Respondents.

MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF AND BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITION

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MOTION OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Association of American Railroads and the National Association of Railroad Trial Counsel respectfully move for leave to file the attached *amici curiae* brief. Petitioner has consented to the filing of this brief; respondents have refused to consent.

The 5 to 4 decision below affirmed the district court's refusal, in a case brought under the Federal Employers' Liability Act, 45 USC §51, *et seq.*, to instruct the jury that they must discount to present value their verdict as to future losses. Four judges

of the majority below opined that it is not error to refuse to so instruct where there is no economic evidence admitted during the trial. The concurring opinion producing the majority, while recognizing the conflict existing between the circuits, opined that the burden of proof was upon the defendant. It recognized that the failure to instruct was error under the holdings of this Court, but nevertheless opined that such error was harmless, since the defendant offered no such evidence.

The members of the Association of American Railroads constitute the vast majority of the nation's railroads which are sued under the FELA, and have a direct interest in maintaining the Act's nationwide uniformity in decisions affecting their financial responsibilities for injuries to their employees. The members of the National Association of Railroad Trial Counsel, who are attorneys representing the various railroads, have a direct interest in the substantive law, as well as the procedures, strategy and tactics involved in the trial of cases brought under the Act.

Although the petition herein correctly describes the conflict between the decision below and those of the other circuit courts which allocate the burden of proof to the plaintiff as to the present worth amount of future losses, it omits any discussion of an additional conflict with three other circuits. They hold that a present value instruction is required even in the absence of any such evidence, premised upon the common knowledge and ability of modern-day jurors.

Quite properly, the petition is limited to arguing the propriety of the holding below. *Amici curiae* submit that the multiple conflicts prevailing throughout the circuits on these basic issues demonstrate that

the Congressional purpose of nationwide uniformity under the Act has been substantially undermined. They are of the view that the desired uniformity can be easily achieved on these questions, which have not been addressed by this Court.

Accordingly, the Association of American Railroads and National Association of Railroad Trial Counsel respectfully request leave to present their views on the issues raised in this litigation.

Respectfully submitted,

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QUESTION PRESENTED

Whether in personal injury and death cases seeking recovery for future losses under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, wherein this Court has consistently required the jury to be instructed to discount such future losses to present value, it is necessary for one of the parties to introduce evidence thereof in view of today's common knowledge of the earning power of money, and if so, which of the parties must present such proof.

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BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITION

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization, headquartered in Washington, D. C. Its members constitute the vast majority of the Nation's railroads. They operate approximately 92% of the line-haul mileage, produce approximately 97% of the freight revenues and employ approximately 94% of the railway work force in the United States, having in the aggregate some 300,000 employees who, if injured or killed, would be entitled to maintain an action for damages under the provisions of the Federal Em-

ployers' Liability Act, 45 U.S.C. §51, *et seq.* Their interest is in maintaining a uniform body of law in cases seeking damages under that Act.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of over 1,200 trial lawyers, who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems arising in the trial of railroad personal injury cases, including those filed under the FELA, with a particular interest in the substantive law, as well as the procedures, strategy and tactics to be utilized in trials thereof.

SUMMARY OF ARGUMENT

The underlying facts and legal issues are adequately set forth in the petition filed herein, and will not be repeated here. Similarly, the conflict between the decision below affirming the trial court's refusal to give a "present value" instruction because no evidence was introduced by the defense, with the decisions of other federal circuits which allocate the burden of such to the plaintiff, as well as the departure by the decision below from previous pronouncements of this Court, are adequately discussed in the petition, so as to meet the criteria governing review on *certiorari* under Rule 17.1.[1] In addition, the decision below conflicts with

[1] *Amici Curiae* agree with Petitioner that the decision below is in direct conflict with *Inman v. Baltimore & O.R. Co.*, 361 U.S. 138 (1959). This brief is limited to the problems involved in the "present value" question, which, as will be demonstrated below, are nationwide in scope in the considerable volume of cases brought in the federal and state courts under the FELA.

decisions in three other circuits which hold that while evidence of future discount rates is admissible, it is not essential for a present value jury instruction.

The purpose of this *amici curiae* brief is to demonstrate additional special and important problems inherent in the decision below on the issue of present value of future losses. The decision below presents a truly important but unsettled question of federal law applicable to FELA cases brought in various federal district courts as well as state courts, which should be resolved by this Court. Immediate resolution is necessary to ensure uniformity of proceedings in the various trial courts, at the same time preserving the integrity of this Court's prior rulings as to the proper basis for the recovery of future lost earnings under the FELA.

ARGUMENT

I.

The FELA's Purpose in Creating Uniformity Has Been Undermined by the Conflicting Approaches Taken by the Various Circuits

Shortly following the enactment of the FELA in its present form, this Court promulgated the principle that the measure of damages thereunder was purely a matter of federal law, superseding all legislation over the same subject by the states. *Michigan Central R. Co. v. Vreeland,* 227 U.S. 59, 66 (1913). In addition to the principle of federal supremacy, this Court has been mindful that:

> One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to rail-

> roads' financial responsibilities for injuries to their employees.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493 n.5 (1980) (citations omitted).

An abbreviated review of the Court's decisions over a span of many years discloses that the Court's pronouncements have consistently upheld these principles. *Michigan Central, supra,* contrasted the elements of damages in personal injury and death cases under the FELA. Several years later, the Court carefully delineated those damages recoverable for wrongful death from those recoverable in a survival action for pre-death injuries under Section 9 of the FELA (45 U.S.C. §59). *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U.S. 648 (1915).

Subsequent decisions fine-tuned the elements of recoverable damages in the companion decisions of *Chesapeake & O. Ry. Co. v. Kelly*, 241 U.S. 485 (1916) and *Chesapeake & O. Ry. Co. v. Gainey*, 241 U.S. 494 (1916), which required a jury instruction that future wage losses be discounted to present value. Then, in *Louisville & N.R. Co. v. Holloway*, 246 U.S. 525 (1918), this Court held that a jury was not bound by the sole evidence of present value introduced at the trial, affirming the trial court's refusal to instruct the jury that they must utilize a specific percentage in calculating present value.

Through the years, the Court has revisited the elements of damages recoverable under the FELA. *Norfolk & Western Ry. Co. v. Liepelt, supra,* held that after-tax earning figures, rather than gross earnings, should be utilized, by reason of the non-taxability of

damage recoveries under the Internal Revenue Code,[2] and in addition precluded consideration of attorneys fees and costs of litigation as unauthorized by the FELA. Even more recently, the Court reversed a state FELA judgment because the trial court failed to instruct the jury that it should determine the present value of future losses. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

The principles of federal supremacy and uniformity in the 4,000-plus FELA cases filed annually[3] are necessary corollaries, given the jurisdiction and venue provisons of FELA. Section 6 of the Act (45 U.S.C. §56) not only provides for multiple venues if the suit is filed in the federal system (*i.e.*, the district of the defendant's residence, or in which the cause of action arose, or in which the defendant is doing business), but also, it gives concurrent jurisdiction to the courts of the several States.[4]

That the intended uniformity has been undermined in handling questions of present value is demonstrated in the petitioner's discussion of the conflict among the circuits as to allocation of the burden of proof on the elements of present value. Those courts, like the lower court here, pre-suppose that evidence of

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[2] 26 U.S.C. §104(c)(2).

[3] The 1986 Annual Report of the Administrative Office of the U. S. Courts discloses that 2,534 FELA cases were filed in the district courts throughout the various circuits (Table C-3). A survey by the AAR of its members shows that more than 1,500 additional FELA cases were filed in the various state courts during the same year.

[4] An FELA case filed in a state court is not removable to a federal court by virtue of 28 U.S.C. §1445(a).

present value is required in order to support the giving of a present value instruction.[5] Thus, another substantial and fundamental conflict among the circuits is presented, as three other federal circuits hold that while expert testimony, present value tables and/or other similar evidence is admissible, such evidence is *not required* in today's world, where jurors are generally aware of the earning power of money and well able to comply with a present value instruction. *See, Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1249-50 (7th Cir., 1974), cert. denied, 419 U.S. 1013 (1974); *Duncan v. St. Louis-S.F. Ry. Co.*, 480 F.2d 79, 87 (8th Cir., 1973), cert. denied 414 U.S. 859 (1973); *Baynum v. Chesapeake & O. Ry. Co.*, 456 F.2d 658, 661 (6th Cir., 1972); and *Pennsylvania R. Co. v. McKinley*, 288 F. 2d 262, 265 (6th Cir., 1961).[6]

While this Court has consistently held that the proper measure of a future loss is its present value as a matter of substantive law, it has not authoritatively ruled on these questions which, while subsidiary, are nevertheless crucial in arriving at the required result. Thus, the multiple inconsistent approaches taken by the various circuits remain unchecked.

It is clear beyond peradventure that neither the railroad employees, nor the interstate railroads (whose lines extend through several federal circuits), should have to contend with differing requirements as to

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[5] This pre-supposition would appear erroneous in view of *Dickerson, supra*, wherein it appears no present value evidence was offered at trial.

[6] The latter case refers to a number of state court decisions holding that such evidence is not required.

proof of damages and jury instructions, depending upon which of the federal circuits or state courts is chosen as the place of trial. Clearly, the present disarray undermines the very uniformity intended by Congress. The situation presented fits the classic pattern of cases where this Court's remedial intervention is required—if denied, a festering problem will be perpetuated; if granted, the dispute will be resolved.

II.

A Uniform Approach Consistent With The Substantive Law is Needed

The questions of whether any proof is required for a present value instruction, and if required, which party bears the burden thereof, involve an obvious inter-relationship to the long-settled substantive law on future losses, as demonstrated by the decision below. Although couched in terms of allocation of proof or failure to introduce evidence upon which to support a present value instruction, the decision below produces precisely the result condemned in the *Kelly*, *Gainey* and *Dickerson* cases—a verdict for future losses predicated upon a multiplication of gross wages by work life expectancy, omitting the required discount to present value.[7]

There are many cases where both parties, like those involved in this case, elect not to introduce economic evidence pertaining to discount rates by reason of a calculated trial tactic or strategy. Obviously, the parties should be given the flexibility to try their respective cases according to their best judgment within

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[7] This result was expressly recognized by the trial court in its Memorandum Opinion (Pet. App., at 35a).

the substantive constraints of the law. The existing disarray which prevails as to those constraints frustrates this flexibility, and therefore, it is for the benefit of all concerned that a uniform approach be adopted.

There are three approaches which have been principally employed by the federal circuits, which in the main involve the following:

First is that taken by those circuits[8] which hold present value evidence admissible, but not required, the jury being able to comply with the present value instruction on the basis of their common knowledge. This approach allows flexibility to the parties to present evidence of the type and scope they deem necessary, and/or to explain to the jury in final argument how to perform the discount to present value. Legally, it is entirely consistent with *Kelly*, *Gainey* and *Dickerson*, which required the present value instruction even in the absence of any such evidence. It is utilitarian, as it simplifies and shortens the trial and has been successfully employed for many years, beginning long before the advent of forensic economic testimony.

Second is the approach taken by those circuits which hold that such evidence is required, and place the burden upon the plaintiff. It is consistent with *Liepelt's* evidentiary analysis[9] that after-tax, rather than gross earnings are the only realistic measure of damages—*i.e.*, in determining future losses, evidence of work-life expectancy, without any accompanying dis-

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[8] Discussed above, at p.6.

[9] 444 U.S., at 493-494.

count factor, lacks an essential relevant factor to establish the present value of the future loss. On the other hand, as a practical matter, it may tend to make the plaintiff feel obligated to present expert testimony in every case, and somewhat affect counsel's exercise of tactical judgment to proceed without such evidence in appropriate cases.

Third is the approach taken by the decision below requiring such evidence, but placing the burden of proof upon the defendant. *Amici curiae* believe that this approach is legally wrong, and impractical. Quite apart from its departure from the substantive requirements enunciated in *Kelly*, *Gainey* and *Dickerson*, it also involves a practical dilemma of significant proportions—it would require the defendant to incur the expense of preparing such testimony in every case. For example, where plaintiff has identified an expert economist prior to trial, but decides for tactical reasons not to introduce such evidence, the defendant would have to be prepared to meet a significant burden thrust upon it in mid-trial.

Amici curiae recognize that in addition to the above, conceivably there may be several other approaches available. One might, for example, have the jury in every case answer special interrogatories as to after-tax earnings and the length of work-life expectancy. Following the special verdict, the Court could perform the discount to present worth, which would simplify the trial, but would impose an additional burden upon the trial judge.[10] For instance, in

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[10] The legal problems for the trial court which are involved in such an approach are demonstrated in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). That decision, while not

attaining the "risk free, after-tax" rate counseled by *Liepelt* and *Pfeifer*, the trial court could take judicial notice of the current yield on AAA state tax-free obligations maturing in the last year of plaintiff's work life.[11] If periodic sales would be constructively required to provide payments from both principal and income, the Court could utilize in part the yield on obligations maturing in the year of such constructive sale. This would result in a rate of interest which would be free from both federal and state tax if the plaintiff were a resident of the state issuing the obligations.[12] Where plaintiff's state of residence has no AAA obligations available (*i.e.*, that plaintiff would be "constructively forced" to secure AAA-rated obligations of another state) and the interest would be taxed by his own state, the effect of such taxes could be offset against the discount rate. We do not advocate an approach of this type, due to our substantial doubts not only as to its Constitutionality, since it may invade the province of the jury, but also as to whether its ungainliness would negate its utility.

Because of the importance of the present value issue to the various state and federal trial courts, as well as to the parties facing trial, the existing con-

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an FELA case, nonetheless rejected the "total offset" result obtained in the case at bar.

[11] An alternative method would involve the yield on U.S. Treasury Bonds, and a calculation of the effect of annual federal and state taxes on the interest payments, so as to arrive at a net discount figure.

[12] A typical case is Maryland, whose obligations are rated AAA. The Annotated Code of Maryland provides that interest income, as well as any profit realized in its sale or exchange, is totally exempt from taxation within the State. Art. 31, §22.

flicts between the various circuits cry out for a definitive resolution of this very practical problem which has developed over the years under the substantive law of recovery enunciated by this Court. The decision below results in a gross departure from this substantive law, and when the number of FELA cases pending in the various courts is considered, it is obvious that a uniform rule would benefit the parties, and at the same time best serve the administration of justice.

CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit in this case should be granted.

Respectfully submitted,

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